

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner
Marshall Johnson
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint of the
Minnesota Department of Commerce Against
Vonage Holding Corp Regarding Lack of
Authority to Operate in Minnesota

ISSUE DATE: September 11, 2003

DOCKET NO. P-6214/C-03-108

ORDER FINDING JURISDICTION AND
REQUIRING COMPLIANCE

PROCEDURAL HISTORY

On July 15, 2003, the Department of Commerce (DOC) filed a complaint against Vonage Holdings Corporation (Vonage) alleging, among other things, that Vonage has offered and continues to furnish telephone services in Minnesota, including local exchange service and long distance service, without first obtaining a certificate under Minn. Stat. §§ 237.16 and 237.74, for those services. The complaint further alleges that the manner in which Vonage provides local service violates Minnesota law in that it fails to provide adequate 911 service. The complaint includes a request for temporary relief.

On July 23, 2003, Vonage filed its response to the DOC's request for temporary relief.

On July 30, 2003, Vonage filed its Answer and Motion to Dismiss. MCI filed a Petition to Intervene and comments.

On August 1, 2003, the Commission issued its ORDER DENYING TEMPORARY RELIEF.

On August 6, Motorola Inc. (Motorola) filed comments supporting Vonage's Motion to Dismiss.

On August 8, 2003 the DOC filed its reply.

On August 11, 2003, the Minnesota Independent Coalition (MIC) filed a Petition to Intervene and initial comments.

AT&T, Level 3 Communications, Inc. (Level 3) and Sprint Communications Company L.P. and Sprint Minnesota, Inc. (jointly Sprint) appeared as participants in this matter.

On August 13, 2003, the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. Background

A. The DOC's Complaint

The DOC's complaint alleged that:

- Vonage was providing telecommunications service in areas served by local exchange carriers with 50,000 or more subscribers in Minnesota, without having first obtained a certificate of authority to do so under Minnesota Statutes and Rules;¹
- Vonage had not submitted a plan detailing how it would provide 911 service to its customers consistent with applicable law;²
- Vonage had not remitted any 911 fees to the Department of Administration;³
- Vonage had failed to file any Commission-approved rate, toll, charge or price list for any service, as required.⁴

The Complaint asked the Commission to impose the following remedies:

- Order Vonage to fully comply with all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota;
- Order Vonage to remit 911 fees to the Minnesota Department of Administration for the period when it served Minnesota customers but did not pay such fees;
- find that Vonage knowingly and intentionally violated Minnesota Rules and Statutes;
- assess penalties the Commission deems appropriate under Minn. Stat. § 237.461 or .462; and
- grant other just and reasonable relief.

¹ Minn. Stats. § 237.16, subd. 1(b) and § 237.74, subd. 12 and Minn. Rules part 7812.0200, subp. 1.

² Minn. Rules part 7812.0550, subp. 1.

³ Minn. Stat. § 237.49.

⁴ Minn. Stat. § 237.07.

B. Applicable Law

Minn. Stat. § 237.01, subd.7 defines “telephone company” as follows:

“Telephone company,” means and applies to any person, firm, association or any corporation, private or municipal, owning or operating any telephone line or telephone exchange for hire, wholly or partly within this state, or furnishing any telephone service to the public.

Minn. Stat. § 237.16, subd. 1 (b) gives the Commission the following authority:

No person shall provide telephone service in Minnesota without first obtaining a determination that the person possesses the technical, managerial, and financial resources to provide the proposed telephone services and a certificate of authority from the commission under terms and conditions the commission finds to be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules, and the commission’s rules.

The statute does not specifically define telephone service.

In Minnesota Microwave, Inc. v. Public Service Commission, 291 Minn. 241, 190 N.W.2d 661 (1971), the Minnesota Supreme Court considered for the first time whether a private company providing unidirectional, closed-circuit, microwave facilities was subject to the jurisdiction of the Commission as a “telephone company” or a supplier of “telephone service.” The court stated:

[W]hether appellant is supplying “telephone service” is a question of law to be determined on the basis of the operative facts determined by the commission.

II. Position of the Parties

A. Vonage

Vonage agreed that it has not applied for certification, not submitted a 911 plan to the Commission, not remitted any 911 fees to the Department of Administration and not filed any tariffs in Minnesota. However, Vonage argued that it was not offering telephone service in Minnesota, and therefore was not subject to certification requirements or the other requirements cited.

It argued that its service was not a “telephone service” within the statutory meaning of that term. Rather, Vonage argued that it was an “information services” provider and, as such, was not subject to the jurisdiction of the Commission. Because it did not provide telephone services, it argued, it was not in violation of any Minnesota Statutes or Rules.

It argued that while the function that Vonage provides is similar to that provided by traditional telephone companies, the manner in which Vonage provides its service is significantly different. It stated that it does not provide its customers with facilities for communication; rather, the customers must obtain access services independently from an Internet Service Provider (ISP). It argued that its provision of Voice Over Internet Protocol (VOIP) service does not originate and terminate calls in a format that is compatible with the traditional, circuit-switched telephone network.

Further, Vonage's service requires the installation of a Multimedia Terminal Adaptor (MTA) on the customer's premises. When a Vonage customer originates a call the MTA allows Vonage customers to convert analog voice signals into digital Internet Protocol (IP) data packets that travel over the Internet in an asynchronous mode. The MTA is also used by Vonage subscribers to convert digital IP packets that travel over the Internet into analog voice signals when receiving calls.

Vonage requested that the Commission dismiss the complaint. It argued that the issue of the classification of VOIP services is an issue of first impression in Minnesota and would be better addressed in a workshop open to all interested parties, rather than in this complaint. It requested that the Commission hold such a workshop, arguing that it would allow the Commission to gather facts concerning the services provided in Minnesota and obtain a better understanding of the technology used to provide VOIP services. It would also permit the development of a full record on the policy implications of VOIP. Vonage indicated that a number of other states have opened VOIP workshops and urged this Commission to do the same.

Vonage also argued that the Commission's jurisdiction under Minnesota statutes may be subject to preemption to the extent that state law requirements are inconsistent with federal law or rules. It argued that the Federal Communications Commission (FCC) is considering VOIP issues in several open dockets and that this Commission should not impose restrictions on VOIP traffic until the FCC takes action on these matters.

B. DOC

The DOC argued that Vonage was offering a telecommunications service in Minnesota. The Commission has an obligation to regulate public interest and safety issues relating to such services in Minnesota. There has been no federal preemption at this time. Although the FCC may be looking at similar issues, it is possible that the FCC may never reach this specific issue.

The DOC argued that the FCC outlined several factors to examine in determining whether Internet Protocol telephony is a telecommunications service: 1) the provider itself holds itself out as providing voice telephony service; 2) the service allows use of Customer Premises Equipment (CPE) similar to the CPE necessary to place an ordinary touch-tone call over the public switched network; 3) the service allows the customer to call telephone numbers assigned in accordance with

the North American Numbering Plan (NANP); 4) the service transmits customer information without net change in form or content.⁵

The DOC argued that Vonage holds itself out as offering telephone service. It indicated that Vonage represents to its customers on its website that it is offering “phone service” and also states that its service “is like the home phone service that you have today—only better!” and “replaces your current phone company.”⁶ Vonage also represents that its service can be used with any touch-tone phone, which, the DOC argued, is considered standard CPE for telephone service. Further, the DOC argued that the service offered by Vonage allows its end users to call telephone numbers assigned in accordance with NANP. Also, the DOC indicated that the FCC has stated that phone-to-phone IP telephony transmits customer information without a net change in form or content.⁷ The DOC argued that Vonage’s service meets the criteria set forth by the FCC, above, and supports a determination that the service is a telecommunications service and not an information service.

Further, the DOC, in response to Vonage’s argument that its IP telephony service was information service under the federal statute,⁸ argued that Vonage markets its Digital Voice service on its website as a telecommunications service and nowhere mentions its service as an informational service. Further, the DOC noted that the FCC, in its Report to Congress⁹, discounted the argument that voice communications using IP telephony, of the type used by Vonage, fell under the definition of information services.

The DOC opposed Vonage’s request for a VOIP workshop. The DOC argued that if the Commission were not to assert jurisdiction, the issue of jurisdiction could go to a lead Commissioner or as part of a contested case procedure for a recommendation. It argued that while workshops may work well to explore how some issues should best proceed, it would be awkward for determining jurisdictional issues.

⁵ See *In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13FCC Rcd 11501 (1998).

⁶ See www.vonage.com/learn_tour.php.

⁷ See footnote 5, above, at fn 188.

⁸ 47 U.S.C. § 153(20).

⁹ See footnote 5, above.

The DOC further challenged Vonage's statement that VOIP is an issue of first impression for this Commission. The DOC indicated that the Commission has granted certificates of authority to other VOIP providers.¹⁰ The difference here is that Vonage is refusing to comply with certification and other requirements.

C. RUD-OAG

At hearing, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG) agreed with the DOC's position.

It argued that the service provided by Vonage was telephone service and Commission regulation was consistent with the Commission's duty to ensure adequate and reliable phone service. It indicated that the legislature has not carved out an exception for this service.

Further, it argued that the possibility of preemption at a later date should not stop the Commission from fulfilling its regulatory obligations at this time.

D. MCI

MCI argued that in order for the Commission to move forward on the complaint brought by the DOC, the Commission must make a threshold finding that it has jurisdiction over the complaint. In order for the Commission to determine whether the service provided by Vonage constitutes a "telecommunication service" under 47 U.S.C. § 153(43) or an "information service" under 47 U.S.C. § 153 (20) will require a detailed and thorough factual record. This Commission must address this threshold jurisdictional issue before it takes any other action on the complaint.

MCI recommended that the Commission dismiss the complaint, open an investigation to determine whether the service is a telecommunications service or an information service under the above statutes and refer the specific question of whether the Commission has authority to regulate the service offered by Vonage for contested case proceedings.

MCI argued that any decision made by the Commission regarding the regulation of a VOIP service will affect Universal Service Fund issues, intercarrier compensation issues and carrier obligations under § 251 of the Federal Telecommunications Act of 1996 (the Act).¹¹ It will affect other parties than those that are the subject of this complaint.

¹⁰ See *In the Matter of a Request by SurfTel, Inc. for Approval for a Certificate of Authority to Provide Facilities Based Interexchange Services*, Docket No. P-5782/NA-99-588, Commission Order Approving Application, June 29, 1999.

¹¹ Pub.L.No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

E. Motorola

Motorola supports Vonage's motion to dismiss the complaint. It argued that the Commission should dismiss the complaint and refrain from adopting any rules with respect to VOIP services until the FCC has had an opportunity to determine what federal or state regulations, if any, may be imposed on such services.

Motorola indicated that it is particularly interested in this proceeding because Vonage is one of many companies for which it is developing VOIP products. It has an interest in seeing a coherent, national regulatory framework develop. Further, Motorola believes that regulators should refrain from extending existing regulations to novel advanced systems and technologies unless there is evidence that marketplace constraints are inadequate to promote competition and consumer welfare.

F. MIC

MIC supported the position of the DOC. MIC argued that the proper focus for the Commission is on the service offered to customers, not the technology used to provide that service. It argued that Vonage's service was a direct replacement for local phone service and, as such, was within the meaning of Minnesota Statutes and Rules.

Although Vonage may provide some non-telephone services, such as some information services, MCI argued that this does not exempt Vonage from complying with Minnesota Statutes and Rules with respect to the services that are telephone services. Further, Minnesota law does not provide any exemption from its treatment of telephone service based on the technology used. There is no exemption in Minnesota law for VOIP services.

Finally, MIC argued that there is no federal authority establishing preemption under these facts.

G. AT&T

AT&T indicated its concern that the relief sought by the DOC has broad policy implications for the telecommunications industry. AT&T questioned the appropriateness of the Commission contemplating these broad policy issues based on an isolated fact pattern involving the services offered by one company.

H. Level 3

Level 3 urged the Commission to consider unintended consequences of any decision that, in the context of a single service provider and single service application, broadly addresses VOIP technologies and service providers that offer VOIP products. Any order addressing VOIP services should narrowly evaluate the specific attributes of a particular service to determine how it fits within the regulatory framework.

I. Sprint

Sprint stated that several of the disputed issues could affect Sprint's interests, especially with regard to intercarrier compensation issues that may arise with VOIP calls.

III. Commission Action

The threshold question facing the Commission is whether the Commission has jurisdiction to address the DOC's complaint. This is a legal issue under Minnesota law, not a factual dispute. As noted by the court in the Minnesota Microwave decision, this question is resolved by applying the facts in this case to the relevant Minnesota law. It is not necessary for the Commission to determine whether VOIP service is a telecommunications service or an informational service under federal law, and the Commission will not do so.

Further, the Commission finds that the facts of this case are well set forth in the record and there are no material facts in dispute that require the matter be sent for contested case proceedings.

To address this matter, the Commission examined the service that Vonage provides. The Commission finds that Vonage offers unlimited local and long distance calling as well as Caller ID, Call Waiting and Voicemail. Vonage itself holds itself out as providing all-inclusive home phone service and advertises that it replaces a customer's current phone company.

With the Vonage service the customer uses an ordinary touch-tone phone to make calls and carry on conversations. The customer must have an ISP and a computer modem. Although the phone is plugged into an MTA router which, in turn, is plugged into the modem, the consumer is being provided with service that is functionally the same as any other telephone service. Further, the Vonage service intersects with the public switched telephone network.

The Commission finds that what Vonage is offering is two-way communication that is functionally no different than any other telephone service. This is telephone service within the meaning of Minn. Stat. § § 237.01, subd.7, and 237.16, subd. 1(b) and is clearly subject to regulation by the Commission.

Further, although there have been arguments that other states and the FCC are addressing the status of the VOIP technology, the Commission finds that, at this time, there is no evidence that supports the claim that this issue has been decided. Nor is there any federal law that preempts state law with respect to telephone services provided using VOIP technology. Further, the Minnesota Legislature has not exempted services provided by VOIP technology from regulation.

For the above reasons, the Commission finds it has jurisdiction over Vonage as a company providing telephone service in Minnesota, and the Commission will require that Vonage comply with Minnesota Statutes and Rules, including certification requirements and the provisioning of 911 service.

The Commission will so order.

ORDER

1. Vonage shall fully comply with all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota within 30 days of this Order.
2. Vonage shall remit 911 fees to the Minnesota Department of Administration for the period when it served Minnesota customers but did not pay such fees.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).